Supreme Court, U.S.
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No. 02-817

In the
Supreme Court of the United States

STEAM PRESS HOLDINGS, INC., DBA YOUNG LAUNDRY AND DRY CLEANING, AND MICHAEL DRACE,
Petitioners,

v.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, AS AN INDIVIDUAL, DOE DEFENDANTS 1-150,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Chief Justice Rehnquist's opinion in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) provides a scholarly review of defamation from its 16th century common law origins through this Court's long line of cases balancing the defamed's rights to a remedy against the speaker's First Amendment rights. The Court then rejected new limits on defamation actions via a mandatory "opinion v. fact" analysis holding "[w]e are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required". Id. at 21. It said "the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine[.]" Id. at 19 (internal citations, brackets and quotation marks omitted). The Court then emphasized the countervailing interests of the defamed party as follows:

> [T]here is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). Justice Stewart in that case put it with his customary clarity:
>
> > "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty.

* * *

> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Id., at 92-93, 86 S.Ct., at 679-680 (concurring opinion).

We believe our decision in the present case holds the balance true.

Milkovich, 497 U.S. at 22-23.

In the instant case – notwithstanding the Union's contrary characterizations – the Ninth Circuit has expanded a limited protection into an absolute privilege for defamation in labor settings contrary to this Court's carefully established balance. And while paying lip service to the defamation standards set out by this Court in Milkovich, Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) and other cases, the Ninth Circuit misapplied or ignored them, disregarding the trial court's findings of the factual verifiability of the defamatory statements and malice which were supported by substantial and unrefuted evidence in the record, and replaced them with its own unsupported speculation[1] as to what the Union's defamatory statements "may" or "could have" meant. This expansion of privilege

[1] To support its holding that Kahele's statements were not defamatory, the Ninth Circuit speculated, without reference to any supporting testimony or evidence, what Kahele's defamatory statements "may have been intended to communicate" or what they "could have been a way of demanding" or what he "may have been saying[.]" Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, 302 F.3d 998, 1007 (9th Cir. 2002) (emphases added).

and departure from well-established defamation standards merits this Court's review.

I. The Ninth Circuit's Decision Significantly And Repeatedly Departs From Established Defamation Standards

While the Ninth Circuit's decision cites circuit precedent and discusses their holdings, it completely disregards the District Court's factual findings showing the true context of the defamatory statements and applies the "totality of the circumstances test" instead of the "reasonable factfinder" analysis adopted in Milkovich, and ultimately ignores this Court's repeated holding that "malicious libel enjoys no constitutional protection in any context[,]" not even labor disputes. Linn, 383 U.S. at 63.

The defamation here is set in the labor context of negotiations for a new contract which Union insisted must significantly increase financial benefits. Drace explained to Kahele that YLDC was having serious financial difficulties and could not afford an increase in wages and benefits for union members. (App. 50a ¶ 27, 53a ¶¶ 37 – 38)[2]. Kahele summarily rejected that information, refusing to believe Drace or review YLDC's financial records, and falsely told Union members their employer was making millions and hiding it away, (App. 72a ¶ 124), clearly implying Drace and YLDC were not only lying to their employees but were defrauding them too. When contract negotiations came to an impasse, largely because Kahele refused to believe Drace, both sides agreed that Union's own CPA would examine YLDC's books to determine whether Drace was telling the truth about

[2] "App." Refers to the appendix to Petitioners' Petition for Writ of Certiorari followed by "X" page numbers; reference to Petitioners'Excerpts of Record before the court below is to "PER" followed by "X" page numbers.

YLDC's financial status. (App. 61a ¶ 75). After reviewing the books, Union's CPA plainly told Kahele YLDC was financially strapped and did not have money. (App. 62a – 63a ¶¶ 78 – 84). Kahele wilfully disregarded those facts and again falsely told Union members – who presumably knew YLDC had rejected their demands saying it just didn't have the money – their employer was making and hiding millions of dollars.

A proper analysis of context shows Kahele's statements to Union members on September 11, 1998 and again on September 29, 1998, that YLDC and Drace were "making money" and "hiding money," in the range of "$7 to $10 million" (App. 72a ¶ 124, 74a – 75a ¶ 129, 82a ¶ 149), were not only believable, but were undisputedly believed, as the District Court found. (App. 83a ¶ 152, 84a ¶ 153). Union member Hannah Kilakalua testified without contradiction that YLDC employees believed Kahele's statements. (App. 70a – 71a, ¶ 120). Upon hearing Kahele's statements, YLDC employees demonstrated their belief by responding "Oh, that sucking Mike," and that Drace was a "son of a bitch" (App. 71a – 72a ¶ 122) (PER0247-48) and thereafter viewing Drace with distrust. The Ninth Circuit even acknowledged witness Kilakalua's testimony that she believed Kahele's defamatory statements. See Steam Press, 302 F.3d at 1008.

The Ninth Circuit, however, ignored the true context, ignored the uncontested testimony and findings that YLDC's employees did believe Kahele, and with no supporting evidence concluded Kahele's false statements were actually just "a call to arms, not assertions of objective fact" simply because the "[u]nion meetings at which Kahele made his statements were 'circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole.'" Id.

at 1007, 1009 (citation omitted). This departure from the well-established standard for analyzing defamatory meaning of statements in a labor negotiation setting merits review.

A. Milkovich's "Reasonable Factfinder" And "Core Of Objective Evidence" Tests Replace The Totality Of The Circumstances Test

In Milkovich, this Court reversed the Ohio Supreme Court's decision based on the "totality of circumstances" test or multifactor analysis, 497 U.S. at 8-9, and instead adopted the "reasonable factfinder" analysis to determine, on a core of objective evidence, whether (1) a reasonable factfinder can conclude that the statements imply an assertion of objective fact rather than hyperbole and (2) the statements are sufficiently factual to be susceptible of being proved true or false. See id. at 21. Applying this analysis, the Court said a reasonable factfinder could conclude that the caption[3] and text of the subject article "imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." Id. Indeed, the mere connotation that Milkovich committed perjury was sufficiently factual to be susceptible of being proved true or false.

In Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), the Ninth Circuit properly applied Milkovich to hold "the threshold question in defamation suits is not [as Union here contends] whether a statement might be labeled 'opinion,' but rather whether a reasonable factfinder could conclude that the statement impl[ies] an assertion of objective fact." Id. at 1053. (quoting Milkovich, 497 U.S. at 18)

[3] The article bore the heading "Maple beat the law with the 'big lie,'" and contained the following passages: "A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out." Milkovich, 497 U.S. at 4 (internal quotation marks omitted).

(internal quotation marks omitted). The Ninth Circuit concluded that T.V. newscaster Andy Rooney's statement that Unelko's product "Didn't Work" was an assertion of fact, not loose figurative or hyperbolic language, notwithstanding the humorous and satirical tenor of the Rooney broadcast, and that the statement was sufficiently factual to be susceptible of being proved true or false. See Unelko, 912 F.2d at 1053-55.

While the Ninth Circuit acknowledged here that Kahele's statements "employ plain unadorned language" and are not "the type of language that courts of this circuit have previously found to be loose and figurative", Steam Press, 302 F.3d at 1007, it discarded the Milkovich "reasonable factfinder" and "core of objective evidence" standard to hold that a labor context trumps clearly provable defamatory content.

B. The Ninth Circuit Decision Overrules This Court's Limitation On Defamation Privilege In A Labor Setting

"[T]he Bresler-Letter Carriers-Falwell line of cases [only] provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Milkovich, 497 U.S. at 20 (emphasis added). Put another way, there is no protection for defamatory statements that can reasonably be interpreted as stating actual facts about an individual.

Here again the Ninth Circuit has ignored or rewritten that standard. Disregarding the fact that Kahele's statements could be reasonably interpreted as stating actual facts about an individual, and thus were not within the purview of the protection, and disregarding the evidence and the context of the defamation, the Ninth Circuit crafted alternative interpretations of Kahele's remarks, then used those interpretations to conclude the protection applied. The Ninth

Circuit has expanded a specific, carefully crafted exception to engulf and effectively eliminate defamation as a cause of action in a labor setting, granting unions license to say anything despite knowing, as Kahele did, that their statements are undeniably and knowingly false. That was clearly not this Court's intent.

C. Context Is Only Considered In The Determination Of Whether A Statement Is Factual

Respondent incorrectly argues that Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970), Letter Carriers v. Austin, 418 U.S. 264 (1974) and Hustler Magazine v. Falwell, 485 U.S. 46 (1988) hold that context always trumps defamatory content. These cases considered context as one factor in determining whether a statement contained an assertion of fact. In these three cases, context showed no reasonable finder of fact could believe that a developer was actually a blackmailer, Greenbelt, 398 U.S. at 14, a parody of a public figure was true, Hustler Magazine, 485 U.S. at 57, or a union member was actually a traitor, Letter Carriers, 418 U.S. at 283-84. No fact existed, ergo, no defamatory statement existed. In contrast, the context in this case mandates belief, not disbelief or ambiguity. Made in the midst of contract negotiations where the employer's financial status was the central issue, Kahele's statements were a scathing factual indictment of fraud and deceit which the employees heard, understood and clearly believed, destroying the good reputations of Drace and YLDC and damaging the business as well.

D. Defamatory Statements Are Not Immunized Just Because They Are Made In The Broad Context Of A Labor Controversy.

In Linn, this Court stated that epithets such as "scab," "unfair" and "liar" were not immunized just because they

were made in the course of a labor controversy. Linn, 383 U.S. at 60-63. False statements made with malice, which cause injury, are not protected by either the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, et. seq. or by the First Amendment. Linn, 383 U.S. at 64-65; see also Letter Carriers, 418 U.S. at 272-73; San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1235 (9th Cir. 1997). No party to labor negotiations enjoys a "license to injure the other intentionally by circulating defamatory or insulting material known to be false." Letter Carriers, 418 U.S. at 272 (quoting Linn, 383 U.S. at 61).

Balancing federal labor law goals with a state's local interest in protecting the reputations of its citizens and businesses, this Court acknowledged that while the NLRA manifests an intent to encourage robust debate on issues dividing labor and management, "malicious libel enjoys no constitutional protection in any context." Linn, 383 U.S. at 63 (emphasis added). "After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." Id. (emphasis added).

Accordingly, Kahele's malicious lies enjoy no constitutional protection in any context, Linn, 383 U.S. at 63 (emphasis added), and the Ninth Circuit's decision directly conflicts with this Court's decision in Linn, notwithstanding Union's argument to the contrary.

E. Protection For Defamation During Organizing Campaigns Should Not Extend To Union Representation And Contract Negotiations

This case presents what appears to be a question of first impression: Do the protections granted unions in organizing campaigns extend to normal representation and

contract negotiations? Both Linn and Letters Carriers involved defamation during organizing campaigns;[4] a campaign leaflet in Linn and a union "organizational drive" newsletter in Letter Carriers. Letter Carriers, 418 U.S. at 266. While acknowledging the liberal standard applied to organizational campaign rhetoric,[5] the Court said even that is not without limits. The Court held that libel actions under state law are not preempted by the federal labor laws for publication of defamatory statements in labor disputes which are knowingly false or made with reckless disregard for the truth. See Letter Carriers, 418 U.S. at 272-73.

The significant, albeit not absolute, protection was tailored to the unique context of an organizing campaign, during which union organizers have virtually unlimited license to entice employees. However, once employees join the union, their relationship with union officials is much different, and protection afforded a defamatory statement during the organizing process is no longer in balance with protections against defamation. Once employees are organized, the union becomes their exclusive representative in dealings with their employer, and the union and its officials then have a fiduciary

[4] Letter Carriers, 418 U.S. at 267, 269, 276.

[5] "Vigorous exercise of this right 'to persuade other employees to join' must not be stifled by the threat of liability for the over enthusiastic use of rhetoric or the innocent mistake of fact." Letter Carriers, 418 U.S. at 277. The degree of permissiveness was further illustrated by a NLRB Regional Administrator who said:

> It is a cliché by now but, nonetheless, an embedded policy in labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, nor do we prohibit, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it up to the employee to decide.

Id. at 275 (footnote omitted).

duty not only to represent its members, but to deal with them truthfully.

Kahele's defamatory remarks were not made in the heat of an organizational campaign, but more than a decade later during contract renegotiations. Petitioners submit that defamation and preemption in these two very different and frequently recurring contexts merit this Court's review and instruction.

II. Federal Labor Policy Is Harmed When Unions Can Lie To Their Members

The Ninth Circuit's decision not only assumes labor leaders lie to their unit members and that unit members know that and expect to be lied to, but it condones and protects the practice even where defamatory. Allowing unions to lie to its members to foment a strike affects important federal labor policies. As this Court stated in Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 75 (1991), a "union owes employees a duty to represent them adequately as well as honestly and in good faith." When members cannot believe their union, this duty is violated, resulting in distrust between a union and its members that denies members the right to meaningfully participate in union affairs and to understand and protect there own interests.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in Petitioners' opening brief, YLDC and Michael Drace, respectfully request that the instant petition be granted.

Respectfully submitted,

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